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No. 03-1160

Supreme Court, U.S.
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In The
Supreme Court of the United States

AZEL P. SMITH, *et al.*,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Academy of Florida Trial Lawyers is a statewide voluntary association of more than three thousand attorneys whose practice emphasizes litigation for the protection of the personal and property rights of individuals. The Academy has a substantial interest in the application of the legal standards relating to the rights of individuals. This case involves a significant question regarding the scope of liability under the Age Discrimination in Employment Act of 1967 (ADEA).

SUMMARY OF ARGUMENT

Section 4(a)(2) of the ADEA permits claims without regard to employer intent. Within that provision, the phrase "because of such individual's age" applies to the *impact* on any individual of an employer's action directed toward employees as a whole—not the action itself. A contrary reading would mean that Congress confused singular with plural.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court relied on the specific language of a provision identical to Section 4(a)(2) to permit disparate impact claims under Title VII. The Court should thus permit disparate impact claims under the ADEA.

ARGUMENT

1. Unless Congress Confused Singular with Plural, Section 4(a)(2) of the ADEA Permits Claims Without Regard to Intent.

Section 4(a)(2) of the ADEA concerns macro actions that an employer takes toward his employees as a whole, and the adverse impact of those actions on individuals:

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[1] The consents of the parties have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amicus curiae* the Academy of Florida Trial Lawyers states that no counsel for either party authored any portion of this brief. No persons other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

> It shall be unlawful for an employer * * * to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2). The "way" that an employer acts towards employees is prohibited only if that way would adversely affect (or tend to adversely affect) "any individual * * * because of such individual's age." Section 4(a)(2) thus does not prohibit *actions* taken "because of" age; it prohibits actions causing (or tending to cause) an adverse impact on any individual where that impact happens "because of such individual's age."[2] Whether the employer intended to affect the individual adversely is irrelevant. The provision is purely result-oriented.[3]

In contrast, Section 4(a)(1) addresses those *actions* that an employer takes because of an individual's age:

> It shall be unlawful for an employer * * * to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1). The provision covers intentional conduct because an employer cannot knowingly act "because of" age without intending to treat workers differently

[2] Such an adverse impact would tend, for example, to occur where an employer had a facially age-neutral rule favoring newer hires or recent graduates.

[3] The ADEA's reasonable factors other than age defense (RFOA) accounts for decisions based on factors other than age that run afoul of this provision, if those factors are *reasonable*. 29 U.S.C. § 623(f)(1). It is a well-worn rule that—for purposes of intentional discrimination cases—an employer may act for a good reason, a bad reason, any reason at all, or no reason at all, as long as the employer does not act because of a discriminatory reason. Given that the RFOA expressly only applies to actions that the ADEA has "otherwise prohibited," the RFOA and its reasonability component make no sense without disparate impact claims.

because of age.[4] A catchall phrase accordingly provides that an employer shall not "otherwise *discriminate* against any individual * * * because of such individual's age." (Emphasis added).

Before *Hazen Paper*, most courts had held or assumed that the ADEA permitted disparate impact claims. *See, e.g., Finnegan v. Trans World Airlines*, 967 F.2d 1161, 1163 (CA7 1992) ("the weight of authority * * * is that disparate impact is a viable doctrine under the age discrimination law."). *Hazen*—especially the concurrence—questioned this assumption and fueled a contrary trend in the courts of appeals. 507 U.S. at 617-18 (Kennedy, J., concurring). The concurrence cited a Stanford Law Review article by student Pamela Krop that argued against disparate impact. *Id.* at 618 (citing Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 842-43 (1982)). The linchpin of that article was a purported "grammatical" argument that the proper construction of Section 4(a)(2) required the phrase "because of such individual's age" to apply to the employer's *actions*, *i.e.*, the actions were taken because of age. Krop, 34 STAN. L. REV. at 842-43. Ironically, however, the article rested on a *fundamental* grammatical mistake: it confused singular with plural.

[4] This does not mean that Section 4(a)(1) *only* covers intentional discrimination. If, for example, an employer acted because of subconscious stereotypes about older workers, those actions would be "because of" age, but not intentionally so. The ADEA was designed to combat "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), and the Court has held that disparate impact analysis is necessary to police "subconscious stereotypes and prejudices," *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1988). *See also EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (age discrimination "based in large part on stereotypes"). The Court has explicitly left open whether Section 703(a)(1) of Title VII—which is identical to Section 4(a)(1)—covers disparate impact as well as disparate treatment claims. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977); *cf. Lorance v. AT&T*, 490 U.S. 900, 914 (1989) (Marshall, J., dissenting) (discussing claim under Section 703(a)(1) as involving the "disparate-impact wing" of the statute).

A correct grammatical analysis of Section 4(a)(2) exposes that the phrase "because of such individual's age" absolutely *cannot* apply to the employer's actions—"to limit, segregate, or classify his employees"—unless Congress meant to say:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* [because of such *individual's* age] in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2) (emphasis added). Since the insertion of the phrase "because of such individual's age" after "to limit, segregate, or classify his employees" is an obviously nonsensical reading of the language of the ADEA,[5] the proper reading of Section 4(a)(2) is:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities [because of such individual's age] or otherwise adversely affect his status as an employee, because of such individual's age.

Ibid (emphasis added). However, the law review article rejected this reading because then the "entire phrase amounts to no more than saying 'adversely affect.'" Krop, 34 STAN. L. REV. at 843 n.26. Perhaps so, but that is by far the more grammatical—and coherent—reading of this provision.[6]

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[5] As written by Congress, there is no "individual" preceding "limit, segregate, or classify his employees."

[6] There should not be much difficulty in accepting this construction, given the phrase "or *otherwise* adversely affect." (Emphasis added). The phrase is similar to the language in parallel section 4(a)(1) "or *otherwise* discriminate." Phrases like these, after specific examples, are accepted as statutory catchalls. *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974) (explaining "any other factor other than" phrase in Equal Pay Act as a "catchall").

Unless Congress made a significant drafting mistake, Section 4(a)(2) does not require intent. Disparate impact claims should be permitted under the ADEA.

2. Contrary to popular belief, *Griggs* actually rested on the "specific language" of Title VII.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that language identical to Section 4(a)(2) permitted plaintiffs to proceed with disparate impact claims. *Griggs*, 401 U.S. at 431. Some arguments against permitting disparate impact claims under the ADEA center on a belief that *Griggs* was not based on the language of Title VII. But the Court contemporaneously explained in *Jefferson v. Hackney*, 406 U.S. 535, 549 n.19 (1972), that *Griggs* was indeed based on "the specific language of Title VII of the Civil Rights Act." Although the Court cited historical racial animus in *Griggs*, the Court has subsequently held that disparate impact applies to gender discrimination, *Dothard v. Rawlinson*, 433 U.S. 321 (1977), even though Congress' 11th hour inclusion of sex in Title VII does not suggest that Congress considered historical animus against women in passing the Act. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989). Because the ADEA contains the same language that the Court has construed to permit disparate impact claims, disparate impact claims should be permitted under the ADEA.

CONCLUSION

The Court should reverse the judgment below and hold that the ADEA permits disparate impact claims.

June 14, 2004

Respectfully submitted,

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